89-1258

NO.

IN THE

Supreme Court Of The United States

October Term, 1989

BLOUNT COUNTY BOARD OF EDUCATION; JOE M. HAZELRIG, Individually and as Superintendent of Education; GENE VINSON, Individually and as Principal of Locust Fork School,

Petitioners,

v.

MARY E. NICHOLS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

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34 pp

QUESTIONS PRESENTED FOR REVIEW

1. Petitioner seeks, by this petition, to have a judgment set aside, a judgment entered by the District Court in good faith, but invalidated by a decision of this Court; and in so doing asks:

   Should it be mandatory for the U.S. Supreme Court to remand this case, so that the law, as established by this Court, be applied consistently and properly, thereby preventing a public school system from an obviously erroneous application of law?

2. The United States Supreme Court ruled in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 105 L.Ed.2d 45, 109 S.Ct. 2709 (1989), that neither states nor their agencies are "persons" within the meaning of 42 U.S.C. § 1983.

   Where the District Court entered a judgment in this case against a state agency (county board of education) and its officers (superintendent and principal) in a case filed under 42 U.S.C. § 1983 must the case be reversed in light of *Will v. Michigan Dept. of State Police*?

3. In *Jett v. Dallas Independent School District*, 491 U.S. ___, 105 L.Ed.2d 598, 109 S.Ct. 2702 (1989), the United States Supreme Court held that school districts are not liable for the actions of individual school officers unless the individual acts either as a policy-maker of the school district or in keeping with established policy or custom.

   Where judgment is entered by the District Court against a school board without any evidence that the employees were either "policy-makers" or acting upon official "policy or custom" and without any reference whatsoever to this determination, must the case be reversed in light of *Jett v. Dallas*?

4. Whether Petitioner was entitled to a direct verdict where Respondent *failed* to prove that the legitimate, non-discriminatory reasons for the employment decision were pretextual? *Price Waterhouse v. Hopkins*, 490 U.S. ___, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989).

5. Where the District Court failed to resolve whether the principal and superintendent were policy-makers or possessed policy-making authority in the area of employment hiring, must the Court reverse and remand this case for further determination in light of *St. Louis v. Praprotnik*, 485 U.S. 112, 99 L.Ed.2d 107, 108 S.Ct. 915 (1988); *Jett v. Dallas Independent School District*, *supra*, at 105 L.Ed.2d 627-628?

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OPINIONS BELOW

The Opinions and Orders of the United States District Court for the Northern District are reported as follows:

(1) Final Judgment September 15, 1988 App. A-1;

(2) Memorandum Opinion dated September 29, 1988 App. A-2.

The Opinions and Orders of the U.S. Court of Appeals for the Eleventh Circuit are reported as follows:

(3) Opinion (per curiam) June 28, 1989 App. A-7;

(4) Order on Petition for Rehearing En Banc October 31, 1989 App. A-9.

JURISDICTION

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit issued and entered on June 28, 1989. Petitioner timely filed and served a Petition for Rehearing in the Court of Appeals, which Petition was denied without Opinion by Order entered October 31, 1989.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The issues presented on this appeal involve 42 U.S.C. § 1981; 42 U.S.C. § 1983.

PRELIMINARY STATEMENT

By filing this Petition for Writ of Certiorari, Petitioners state that their requests are simple and straightforward: For the Court to make a finding that Petitioners are entitled to the full rights and privileges under the law as set forth by the United States Supreme Court in opinions released last term.

Just before this Court issued the decisions that control the outcome of this case, the District Court in a seven-page opinion begged for clarification because of the overriding public importance of the issues. The District Court expressed its confusion in the following terms at p. 1 of its Opinion (App. A-2):

> The Court approaches this task with the confession that it views the standards applicable . . . in such cases as being so vague and uncertain as to defy reasonable application.

The District Court, in an extraordinary act, requested through its Opinion, for the Court of Appeals to clarify the law applicable to this 42 U.S.C. § 1983 case.

The District Court rendered its decision without the benefit of *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 105 L.Ed.2d 45, 109 S.Ct. 2709 (1989); *Jett v. Dallas Independent School District*, 491 U.S. ___, 105 L.Ed.2d 598, 109 S.Ct. 2702 (1989).

The U.S. Court of Appeals did have these cases before it yet issued a Per Curiam Opinion only 130 words in length without reference to a single legal citation, much less the governing cases just issued by the United States Supreme Court.

Since the decision rendered by the District Court below is simply erroneous in light of *Will v. Michigan Dept. of State Police, supra,* and *Jett v. Dallas Independent School District, supra,* Petitioner begs the Court to allow this conscientious public school system to have the benefit of the law as established by the United States Supreme Court.

For too long individuals in the South did not enjoy the consistent and fair application of the law. This is changing. But in this case a public entity has been mistreated by a Court of Appeals that ignored not only a District Court's plea for clarification, but the very clarification available from the recent decisions of the United States Supreme Court.

I. In *Will v. Michigan Dept. of State Police, supra,* this Court ruled that states and state officials acting in their official capacities are "not persons" who may be sued under 42 U.S.C. § 1983. Plaintiff filed this action alleging gender discrimination pursuant to 42 U.S.C. § 1983 against a state agency, the Blount County Board of Education, the Superintendent of Education and the principal of the school. Judgment was entered against the Defendants contrary to

the specific ruling of this Court in *Will v. Michigan Dept. of State Police, supra.*

The District Court entered judgment in this case as follows:

> Ordered and Adjudged that the judgment is entered in favor of the Plaintiff Mary E. Nichols and against the Defendants Blount County Board of Education; Joe M. Hazelrig, individually and as Superintendent of Education; Gene Vinson, individually and as Principal of Locust Fork Schol.

Entry of this Judgment is clearly contrary to this Court's ruling in *Will v. Michigan Dept. of State Police, supra.*

II. In *Jett v. Dallas Independent School District, supra,* this Court held that school districts are generally not liable for the actions of individual school officials unless the individual acts either as a policy-maker of the school district or in keeping with established or official policy.

In this case, the record is absolutely and totally silent on the issue whether the superintendent or principal were policy-makers and the record likewise discloses no "policy or custom" supporting any discriminatory action.

Accordingly, this case comes to the Supreme Court in identical form and fashion to *Jett v. Dallas Independent School District, supra.*

III. In *Price Waterhouse v. Hopkins*, 490 U.S. ___, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), this Court clarified that a Plaintiff who proves a prima facie case only by circumstantial evidence must show by a preponderance of evidence that the "legitimate, non-discriminatory reasons articulated by the employer are pretextual". In the present case, the District Court erred in failing to enter judgment for Defendants:

(a) Where the Plaintiff admitted that the reason given by the Defendant was a legitimate and proper concern;

(b) Where the Plaintiff failed to present any evidence to disprove the reason given after Defendant articulated its non-discriminatory reasons;

(c) Where the District Court found as set forth at p. 5 of its Opinion that the reasons stated by Defendants were credible and that Plaintiff had not proved discrimination by a preponderance of evidence.

IV. The District Court failed to instruct the jury as required by *St. Louis v. Praprotnik*, 485 U.S. 112, 99 L.Ed.2d 107, 108 S.Ct. 915 (1988) and *Pembaur v. Cincinnati*, 475 U.S. 469, 89 L.Ed.2d 452, 106 S.Ct. 1292 (1986). The District Court simply failed to resolve whether the principal and superintendent were policy-makers or possessed policy-making authority and issued instructions to the jury that they could find against the named individuals if they were convinced from the preponderance of evidence that gender was a determining factor in the decision.

THE CASE BELOW

Plaintiff filed this § 1983 Complaint alleging gender (sex) discrimination by the Blount County Board of Education ("Board"), Joe Hazelrig, as Superintendent and individually, and Gene Vinson, as Principal of Locust Fork High School and individually. Defendants' Answer denied they had discriminated against Plaintiff or other females on the basis of sex, denied that the position was awarded to a less qualified, less experienced employee, and affirmatively alleged several defenses including the Doctrine of Sovereign Immunity.

The Board proved at trial that five applicants applied for the position of Assistant Principal at Locust Fork School (Grades K-12). The position was a non-academic position; the duties involved discipline of students, custodial-maintenance work, and public relations with the community. Plaintiff had no administrative experience; she was and had been employed as a kindergarten teacher. She had no significant experience disciplining older children or doing custodial work.

But the primary reason for the decision to hire a male rather than Plaintiff was because the Locust Fork community

had been racked and torn with tension and disorder because of problems between the parents and the school administration. The problems were so bad that the Southern Association of Colleges and Schools stated in its Task Force Report a full year before the employment decision now in dispute was made that the community relationships must be improved. Plaintiff herself was on this Task Force and admitted at trial that this objective to restore community harmony was a legitimate concern.

The person selected for the job was an elected Trustee of the Locust Fork community, a statutory position, served as a trustee for many years, and was much loved in the community as a trusted and respected leader. These facts were undisputed.

In affirming the decision of the jury, the District Court issued a Memorandum Opinion, which Opinion constitutes an extraordinary appeal to the U.S. Court of Appeals to clarify the standards which should govern in these cases. The District Court stated:

> The Court approaches this task with the confession that it views the standards applicable to the consideration of the sufficiency of evidence in such cases as being so vague and uncertain as to defy reasonable application. . . .
>
> A risk in these cases is that the courts, effectively, establish an affirmative action program through loose application of the substantial evidence rule. If a 'thin vapor' or a 'faint aroma' can be taken as a standard, what has happened to the 'substantial' evidence doctrine. . . . Judge Hill frankly acknowledged that Courts are 'rigging' elections. Perhaps we are also 'rigging' affirmative action. A judge who looks for reasonable certainty in the law can begin to sound like an inveterate carper. If the judge has no secret agenda, the burden can be greater.

In a footnote the District Court explained:

> Perhaps a little carping may be appropriate from time to time. Otherwise, all may be felt to be well in

> the hinterlands in an era of mushrooming cases of this type and when employees receive repeated suggestions that discriminatory employment decisions are the rule. There is a certain irony that the 'good' judges are viewed as those who are 'sensitive' to civil rights claims; not the judges who are 'sensitive' to reasonable certainty in the law. Judges who attempt to give both sides the benefit of the doubt can now be viewed as insensitive.
>
> At one time it took considerable courage for judges to rule in favor of civil rights litigants. Now, it takes none. Now it takes courage for judges to suggest that earlier law may need reconsideration; that the old containers may not hold the new wine. We are reminded from time to time by appellate courts, and repeatedly by plaintiffs, that civil rights cases are due special deference when motions for summary judgment or directed verdict are being considered.

The Court explained why the argument constructed by the Plaintiff is of questionable status:

> Plaintiff has constructed an interesting argument both to the jury and to the court. Plaintiff argues that since Defendants were concerned about morale and discipline at the school, and since Defendants chose Pate, a male, they *must* have chosen Pate because they thought males were better disciplinarians than females. *Defendants* did not say or suggest that. *Plaintiff* is the one who created that scenario. The argument is that 'since Defendants were concerned about discipline, and since it is generally thought (stereotypically) that males are better disciplinarians, Defendants must have so thought in making *their* decision'. Under Plaintiff's argument, once Defendants became concerned with discipline, they were in a Catch-22 situation if they chose a male, because it automatically became a decision based upon stereotyping. The question becomes, who is the stereotyper, the Plaintiff or the Defendants? The reason(s) given by Defendants in the absence of Plaintiff's stereotyping argument, are

> non-discriminatory. *The Court cannot really find a reason to suggest that the reasons given are incredible or that intentional discrimination has been proved by a preponderance of the evidence. (Emphasis added)*

The District Court then summarized its apprehension about the case and the applicable law in these terms:

> Ultimately, a trial judge must ask him (her) self two questions. What do I think? What is appellate court likely to think? Here, I have doubt, but sense that an appellate court, not present at trial, might conclude that the evidence is sufficient. The court makes great effort to see *both sides* and is often reminded of the Roman judge, who having seen both sides of a disputed question, was immediately attacked and killed by both sides.

On appeal, the United States Court of Appeals not only failed to address the painful anguish expressed by the District Court but failed to explain much less clarify the legal framework. The Opinion of the Court of Appeals failed to cite a single case, give any clarification, or respond in any meaningful manner to the heartfelt plea by one of the most conscientious judges on the courts. Even more importantly, the Court of Appeals failed to apply, discuss, or make any reference to any of the recently issued governing Supreme Court cases.

STATEMENT OF THE ISSUES

In seeking relief by Writ of Certiorari, Petitioners raise those issues articulated in the extraordinary Opinion of the District Court, and ask that this Court require that the court below apply the decisions recently issued by the Supreme Court that speak directly and explicitly to the issues raised in this case.

1. The United States Supreme Court ruled in *Will v. Michigan Dept. of State Police*, 491 U.S. ___, 105 L.Ed.2d 45, 109 S.Ct. 2709 (1989), that neither states nor their agencies are "persons" within the meaning of 42 U.S.C. § 1983.

Where the District Court entered a judgment in this case against a state agency (county board of education) and its officers (superintendent and principal) in a case filed under 42 U.S.C. § 1983 must the case be reversed in light of *Will v. Michigan Dept. of State Police*?

2. In *Jett v. Dallas Independent School District, supra,* the United States Supreme Court held that school districts are generally not liable for the actions of individual school officials unless the individual acts either as a policy-maker of the school district or in keeping with established policy or custom.

Where judgment is entered by the District Court against a school board without any evidence that the employees were either "policy-makers" or acting upon official "policy or custom" and without any reference whatsoever to this determination, must the case be reversed in light of *Jett v. Dallas, supra*?

3. Whether Petitioner was entitled to a direct verdict where Respondent *failed* to prove that the legitimate, nondiscriminatory reasons for the employment decision were pretextual? *Price Waterhouse v. Hopkins*, 490 U.S. ___, 104 L.Ed.2d 268, 109 S.Ct. 1775 (1989).

4. Where the District Court failed to resolve whether the principal and superintendent were policy-makers or possessed policy-making authority in the area of employment hiring, must the Court reverse and remand this case for further determination in light of *St. Louis v. Praprotnik*, 485 U.S. 112, 99 L.Ed.2d 107, 108 S.Ct. 915 (1988); *Jett v. Dallas Independent School District, supra,* at 105 L.Ed.2d 627-628?

FACTUAL BACKGROUND

This case originated as an action under 42 U.S.C. § 1983 alleging gender (sex) discrimination by the Blount County Board of Education, Joe Hazelrig, as Superintendent and individually, and Gene Vinson, as Principal and individually. The job at issue was the position of Assistant Principal at Locust Fork School (K-12).

Petitioner proved that the Respondent had no administrative experience, or experience at the high school, since Respondent had served only as a kindergarten teacher. The male applicant hired by the Board not only had extensive administrative experience, but was the best suited of the five applicants to address an overwhelming community problem. On this issue, the superiority of the applicant hired to resolve community problems, there was absolutely no dispute. Respondent herself admitted that community problems were significant and that the resolution of these problems was a legitimate, paramount concern.

TERRIBLE COMMUNITY PROBLEMS: For more than a year before the position of assistant principal became vacant, the Locust Fork community had been torn and divided by problems between the school and community. During the year preceding the vacancy of the position at issue, the Southern Association of Colleges and Schools ("SACS") prepared a report assessing problems and deficiencies at the school. Plaintiff served on the Task Force. The report documented the Association's *extreme* concern about the problem of school/community relations that had been identified by the teachers in the self study report and addressed by parents and students.

The community upheaval documented in the SACS report was verified by every person who testified in the District Court trial. During the spring of 1987, just before the vacancy occurred in June, there were three meetings where parents and members of the community expressed their total dissatisfaction and irritation with the school. The Chairman of the school trustees, a statutory position, testified that the parents at these meetings were "outraged, threatening and acting very unprofessionally." He feared that violence would break out.

At trial, Plaintiff admitted and agreed that a paramount matter for the school was to restore community harmony and that it was important and legitimate for the Board to consider this concern in selecting the assistant principal.

The person selected, Gary Pate, had more administrative experience, more experience in disciplining older children, and most importantly, was a highly respected, much loved member of the Locust Fork community. The community had elected him as one of three school trustees and he had served in this capacity for many years. The evidence was undisputed that he was extremely well regarded in the community and when he was selected as assistant principal, community relations immediately improved.

Plaintiff did not dispute that Pate was highly regarded in the community and the District Court found that this was the primary reason why the male applicant was selected.

Instead Plaintiff argued this reason should yield entirely to the consideration that Plaintiff had completed more work toward a degree and had better overall grades. To this contention, Defendants demonstrated that of the three other candidates two other male applicants had better academic credentials and more administrative experience than did Plaintiff. If the Board had considered only academic credentials, Plaintiff would still not have been the best qualified. She would have finished third behind two other males.

The Board, however, decided that the academic credentials of the two better qualified males and Plaintiff were not as important for this non-academic position as was the ability to help restore community harmony. To make such a decision based on its assessment of the situation was the prerogative of the Board so long as the reason was legitimate and non-discriminatory. In *Price Waterhouse v. Hopkins, supra,* at 104 L.Ed.2d 282-283, the Supreme Court discussed the importance of "preserving an employer's freedom of choice" for non-discriminatory reasons.

When Defendants moved for directed verdict, there was no direct evidence that the decision had been based on sex or gender and no dispute that the reason for the decision was important, legitimate and non-discriminatory as found by the District Court in its Opinion.

It is respectfully submitted that the decision of the District Court, as affirmed without explanation by the Court of

Appeals, is entirely inconsistent with the decisions of the United States Supreme Court.

ARGUMENT

While all cases brought to this Court are important, this case has assumed an overriding importance to the community of Locust Fork and the Blount County Board of Education. These Defendants acted in total good faith as found by the Court. They determined that a priority concern had to be community-school relations. In Alabama where schools are underfunded, community support to provide services and raise money is critically important to the welfare of the school. The Board picked the person best suited to accomplish this task.

Plaintiff's entire case consisted of telling the jury to ignore in essence what the Board thought was important — even though she was not as experienced nor as qualified to restore community relations. The argument advanced by Plaintiff was simply this: You ladies and gentlemen of the jury can ignore the reasons offered by the Board even if they are true and substitute your opinion on what you think is best for the school after hearing four or five hours of testimony.

To allow this to happen is contrary to the law. Plaintiff had the burden to show that the reasons proffered by the Defendants were pretextual. She did not do this. In fact, she admitted the reasons given were legitimate and true. Since the District Court also agreed that the reasons given by the Defendants were true, legitimate and non-discriminatory, Defendants were entitled to judgment as a matter of law.

The Opinion of the three-judge panel of the Eleventh Circuit fails to consider controlling cases just issued by the United States Supreme Court.

In urging the Court to reconsider its decision, Appellants emphasize three matters:

(1) The District Court in its Opinion begged the Court for clarification of the legal standards;

(2) The Eleventh Circuit had every reason to clarify the law. The case is one of considerable public importance,

in fact of great importance to the county and community involved; and, the United States Supreme Court had just issued three opinions that affect the outcome of this case and are of controlling importance.

(3) The parties undertook, at great expense to their clients, the task to refine the issues so the Court could discuss the law in a meaningful manner and respond in a way that would define and declare the standards for determining burden of proof.

DISAPPOINTING, DISHEARTENING OPINION: With all appropriate respect to the judges assigned to this case, judges who were obviously well prepared at Oral Argument, and extremely respectful of the parties and their contentions, Appellants would respectfully suggest that the Opinion issued in this case disserves the parties and the District Judge.

The District Judge asked — earnestly and with passionately considered language — for the Court to address the legal issues and clarify the law. When this Court considers this Petition, Appellant begs the Court to re-read Judge Propst's Opinion. (App. 1) When the Court does re-read the Opinion, surely the Court will acknowledge how regrettable the Opinion released by the Court of Appeals is to the parties and what a disservice it is to the District Court.

ISSUE ONE

DEFENDANTS ARE ENTITLED TO JUDGMENT IN LIGHT OF THE SUPREME COURT DECISION THAT NEITHER A STATE NOR ITS OFFICIALS ACTING IN THEIR "OFFICIAL" CAPACITIES ARE "PERSONS" UNDER 42 U.S.C. § 1983

Plaintiff filed this Complaint under 42 U.S.C. § 1983 against the Board, the Superintendent, and the school principal. The verdict rendered was against all three Defendants.

In *Will v. Michigan Department of State Police, supra,* at 57 U.S.L.W. 4679, the Supreme Court stated:

> Our conclusion that a state is not a person within the meaning of § 1983 as reinforced by Congress' purpose in enacting the statute. . . .
>
> Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a state for alleged deprivation of civil liberties. The Eleventh Amendment bars such suits. . . .
>
> We hold that neither a state nor its officials acting in their official capacities are 'persons' under § 1983.

In Alabama, county boards of education are not agencies of the counties, but local agencies of the state executing a state function. *See Hutt v. Etowah County Board of Education*, 454 So.2d 973 (Ala. 1983); *Jaffee v. Wallace*, 705 F.2d 1526, 1533-34 (11th Cir. 1983). Hence, this suit is barred by the Eleventh Amendment and should be dismissed.

ISSUE TWO

THE DISTRICT COURT ERRED IN ENTERING A JUDGMENT AGAINST THE SCHOOL BOARD WITHOUT ANY EVIDENCE THAT THE EMPLOYEES WERE EITHER "POLICY-MAKERS" OR ACTING UPON OFFICIAL "POLICY OR CUSTOM" IN DISREGARD OF THIS COURT'S OPINION IN *JETT V. DALLAS*

In *Jett v. Dallas Independent School District*, *supra*, the Supreme Court held that school districts are not liable for the actions of individual school officials unless the individual acts either as a policy-maker of the school district or in keeping with established or official policy.

In that case, Jett brought suit against the school district, claiming violations under 42 U.S.C. § 1981 and § 1983. The Supreme Court ruled that school districts and other government agencies are liable only when discriminatory acts are committed by officials with ultimate policy-making power or when the conduct was in accord with the school district's

custom or policies. The Supreme Court affirmed the lower court's finding that the district was not liable because the alleged discrimination against Jett was not caused by a district custom or practice, and sent the case back to the lower court to determine who had policy-making authority concerning the employment action.

In the instant case, the District Court entered judgment against the school district, superintendent and principal without first determining whether the discriminatory acts were committed by officials with ultimate policy-making power or in accordance with the school district's customs or policy.

What the District Court did in the present case is exactly what the District Court did in *Jett*, and forms the same basis for the reversal by the Supreme Court in that case.

ISSUE THREE

THE DISTRICT COURT ERRED IN RULING THAT PLAINTIFF DISCHARGED HER BURDEN BY ESTABLISHING A PRIMA FACIE CASE WHEN PLAINTIFF FAILED TO PROVE THAT THE REASONS PROFFERED BY DEFENDANTS FOR THE EMPLOYMENT ACTION WERE PRETEXTUAL

Plaintiff proved a prima facie case through *circumstantial evidence*: member of a protected minority; qualified for the job; and rejected.

Defendants then articulated "some legitimate, nondiscriminatory reasons" for the employment action taken. Defendants explained that the person hired was much better qualified to restore community harmony, had more administrative experience, and was more experienced in disciplining older students. Plaintiff admitted that community harmony was a legitimate and important consideration. In stating this explanation, Defendants satisfied their "exceedingly light rebuttal burden." *Smith v. Homer*, 829 F.2d 1530 (11th Cir. 1988).

Plaintiff in turn offered no evidence to prove that the proffered explanation was a pretext. To the contrary, Plain-

tiff had previously admitted that the restoration of community harmony was a legitimate concern.

In *Price Waterhouse v. Hopkins, supra,* the Supreme Court clarified the procedure applicable in a pretext case as compared to and contrasted with a mixed motive case. In a pretext case, such as this case, Plaintiff must prove that the stated reasons for the employment action are pretextual. The Court said at 104 L.Ed.2d 285 n. 12:

> At some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives. If the plaintiff fails to satisfy the fact finder that it is more likely than not that a forbidden characteristic played a part in the employment decision, then she may prevail only if she proves, following *Burdine*, that the employer's stated reason for its decision is pretextual.

Plaintiff offered no evidence to prove that the stated reason was pretextual. Plaintiff admitted that this was a legitimate concern. Thus, when the Court concluded that this was the primary reason for the Board's action, the Court was compelled as a matter of law to enter judgment for Defendants. If this Court applies the recent decisions of the Supreme Court, the Court will dismiss Plaintiff's cause of action and render a decision for Defendants.

ISSUE FOUR

WHERE THE DISTRICT COURT FAILED TO RESOLVE WHETHER THE PRINCIPAL AND SUPERINTENDENT WERE POLICY-MAKERS OR POSSESSED POLICY-MAKING AUTHORITY IN THE AREA OF EMPLOYMENT, THE SUPREME COURT SHOULD REVERSE AND REMAND THIS CASE FOR FURTHER DETERMINATION IN LIGHT OF *ST. LOUIS V. PRAPROTNIK*

This case comes to the Supreme Court in exactly the same posture that *Jett v. Dallas Independent School District, supra,* came to the Supreme Court.

In *Jett,* the Supreme Court stated:

> We agree with the Court of Appeals that this instruction was manifest error. The instructions seem to rest either on the assumption that both Principal Todd and Superintendent Wright were policy-makers for the school district, or that the school district is vicariously liable for any action taken by these employees. Since we have rejected respondeat superior as a basis for holding a state actor liable under § 1983 for violation of the rights enumerated in § 1981, we refer to the principles to be applied in determining whether either Principal Todd or Superintendent Wright can be considered policy-makers for the school district such that their decision may rightly be said to represent the official policy of the DISD subjecting it to liability under § 1983.
>
> Last term in *St. Louis v. Praprotnik*, 485 U.S. 112, 99 L.Ed.2d 107, 108 S.Ct. 915 (1988), (plurality opinion), we attempted a clarification of tools a federal court should employ in determining where policy-making authority lies for purposes of § 1983. . . . As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge before the case is submitted to the jury. . . . We remand the case to the Court of Appeals for it to determine whether final policy-making authority as to employee transfers lay in light of the principles annunciated by the plurality opinion in *Praprotnik* and outlined above.

Jett v. Dallas Independent School District, at 105 L.Ed.2d 627-628.

Since the District Court failed to resolve the legal issues required by the Supreme Court under the *St. Louis v. Praprotnik* case, this case should be remanded for such a determination.

CONCLUSION

As demonstrated in the foregoing arguments, the judgment rendered against the Defendants were erroneous in that neither the U.S. Court of Appeals nor the District Court correctly applied the controlling decisions of the United States Supreme Court recently issued. On that basis, this Court should enter a judgment in favor of Defendants or remand this case for trial on the issues as clarified.

Donald B. Sweeney, Jr.

Of Counsel:
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Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Petition for Writ of Certiorari upon all attorneys of record, namely: Jeremiah A. Collins, Esq., Cynthia L. Estlund, Esq., Bredhoff & Kaiser, 1000 Connecticut Avenue, N.W., Suite 1300, Washington, D.C. 20036; John C. Falkenberry, Esq., 5th Floor, Title Building, 300 North 21st Street, Birmingham, Alabama 35203 via United States Mail, postage prepaid and correctly addressed, this the _____ day of January, 1990.

OF COUNSEL

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARY E. NICHOLS,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO:
v.	)	CV87-PT-1732-S
	)	
BLOUNT COUNTY BOARD OF EDUCATION	)	
	)	
Defendants.	)	
	)	

FINAL JUDGMENT

In accordance with the jury verdict and the Motion for Equitable Relief and the Reply to Motion for Equitable Relief, the court ADJUDGES and DECREES as follows:

1. Plaintiff is awarded judgment against the defendants in the amount of Seven Thousand Two Hundred Sixteen and no/100 Dollars ($7,216.00).

2. Defendants are directed to place plaintiff in the position of assistant principal at Locust Fork School effective with the 1988-1989 school year. Costs are assessed against the defendants.

DONE and ORDERED 14 day of September, 1988.*

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARY E. NICHOLS,	)	
	)	
Plaintiff,	)	
	)	CIVIL ACTION NO:
v.	)	CV87-PT-1732-S
	)	
BLOUNT COUNTY BOARD OF EDUCATION	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

This cause comes on to be heard on defendants' Motion for Judgment Notwithstanding the Verdict, or in the Alternative for New Trial.

The court approaches this task with the confession that it views the standards applicable to the consideration of the sufficiency of evidence in such cases as being so vague and uncertain as to defy reasonable application.[1] This is not necessarily a criticism of the developed case law. It is endemic to the breed. One court has referred to the "amorphous" nature of discrimination cases. *Pace v. Southern Railway System*, 701 F.2d 1383, 1387 (11th Cir.), *cert. denied*, ___ U.S. ___, 104 S.Ct. 549, 78 L.Ed.2d 724 (1983). Other cases have spoken of evidence which "reif[ies] to the point even of a thin vapor. . . ." *Simmons v. McGuffey Nursing Home, Inc.*, 619 F.2d 369, 371 (5th Cir. 1980); *Thornborough v. Columbus and Greenville R. Co.*, 760 F.2d 633, 647-48 (5th Cir. 1985). *Thornborough* also makes reference to a "faint aroma" of evidence.

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[1]This may explain why two officers of the court have taken antipodal views of the sufficiency of the evidence.

The determination of whether employment decisions are discriminatory is based on a multi-tier series of subjective decisions. The employer makes a decision; the employee makes a decision to sue; the trial court makes a decision; the jury makes a decision; the trial court makes another decision; and the appellate court makes the final decision. The subjective nature of these decisions is manifested by a review of various cases which have gone both ways on appeal.[2]

A risk in these cases is that the courts will, effectively, establish an affirmative action program through loose application of the substantial evidence rule. If a "thin vapor" or a "faint aroma" can be taken as the standard, what has happened to the "substantial" evidence doctrine.[3] In *U.S. v. Dallas County Com'n, Dallas Co., Ala.*, ___ F.2d ___ (11th Cir. July 13, 1988), Judge Hill frankly acknowledged that courts are "rigging" elections.[4] Perhaps we are also "rigging" affirmative action. A judge who looks for reasonable certainty in the law can begin to sound like an inveterate carper. If the judge has no secret agenda, the burden can be greater.[5]

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[2]For an indication of how this sequence works, compare *Pace, supra; Simmons, supra; Thornbrough, supra; Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981); *Buckley v. Hospital Corp. of America, Inc.*, 758 F.2d 1525 and *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435 (11th Cir. 1985). Also *see Kurtz v. Vickery*, ___ F.2d ___ (11th Cir. 1988) (Fay, J., dissenting). The cases involve what Justice Oliver Wendell Holmes has referred to as a "featureless generality." Juries "not only find the facts but also apply the normative standards for interpreting them." At bottom, we should be honest about the uncertainty in the decisions.

[3]What is the difference between a "thin vapor," a "faint aroma" and a scintilla?

[4]Probably the most ignored statutory provision in history is the provision in 42 U.S.C. § 1973(b) which provides, "That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."

[5]Perhaps a little carping may be appropriate from time to time. Otherwise, all may be felt to be well in the hinterlands in an era of mushrooming cases of this type and when employees receive repeated suggestions that discriminatory employment decisions are the rule. There is a certain irony that the "good" judges are viewed as those who are "sensitive" to civil rights claims; not the judges who are "sensitive" to reasonable certainty in the law. Judges who attempt to give both sides the benefit of the doubt can now be viewed as insensitive.

At one time it took considerable courage for judges to rule in favor of civil rights litigants. Now, it takes none. Now, it takes courage for judges to suggest that earlier law may need reconsideration; that the old containers may not hold the new wine. We are reminded from time to time by appellate courts, and repeatedly by plaintiffs,

This court has already spoken to a similar issue in *Walden v. Blount County Board of Education*, CV87-PT-1318-S, a copy of which is attached hereto. The court will not repeat the statements therein with regard to statistical evidence. The court does note that *Watson v. Fort Worth Bank & Trust*, ___ U.S. ___ (1988), did not change the law with reference to reliability, *vel non*, of statistical review. It reinforces the language in *Hazelwood School District v. United States*, 433 U.S. 299 (1977). *See also Mayor v. Educational Equality League*, 415 U.S. 605, 619-21 (1974); and *Moultrie v. Martin*, 690 F.2d 1078, 1082-85 (4th Cir. 1982).

The question becomes, "What, if anything, distinguishes this case from *Walden*?" A further question is whether the evidence is substantially distinguishable from that in *Grigsby v. Reynolds Metal Co.*, 821 F.2d 590 (11th Cir. 1987). The court has pondered these questions.[6]

Plaintiff has constructed an interesting argument both to the jury and to the court. Plaintiff argues that since defendants were concerned about morale and discipline at the school, and since defendants chose Pate, a male, they *must* have chosen Pate because they thought males were better disciplinarians than females. *Defendants* did not say or suggest that. *Plaintiff* is the one who created that scenario. The argument is that "since defendants were concerned about discipline, and since it is generally thought (stereotypically) that males are better disciplinarians, defendants must have so thought in making *their* decision." Under plaintiff's

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that civil rights cases are due special deference when motions for summary judgment or directed verdict are being considered.

For the twelve-month period which ended March 31, 1987, 20,663 employment and other civil rights cases were filed in federal courts. Just five years earlier, 16,769 such cases were filed. For the same period ending March 31, 1987, the number of all federal court filings dropped 9%. Employment and other civil rights cases increased 4%. It sometimes seems that the civil rights "movement" has become a civil rights litigation "explosion." This judge had absolutely no problem with the "movement." The "explosion" sometimes disturbs him, particularly as it relates to uncertainty, emotional appeal, attorney fees, costs, jury selection, etc. Those who complain of discrete discrimination are not always so discreet when selecting juries. Usually an effort is made to select jurors who would have apparent "minority" biases.

[6]The court particularly notes the statements in *Grigsby* at 821 F.2d at 596 and in *Pace, supra* at 1838, 1391 (11th Cir. 1983).

argument, once defendants became concerned with discipline, they were in a Catch 22 situation if they chose a male, because it automatically became a decision based upon stereotyping. The question becomes, who is the stereotyper, the plaintiff or the defendants? The reason(s) given by defendants, in the absence of *plaintiff's* stereotyping argument, are non-discriminatory. The court cannot really find a reason to suggest that the reasons given are credible or that intentional discrimination has been proved by a preponderance of the evidence.

This court is not totally satisfied that it can make a distinction between this case and *Grigsby*. The distinction between this case and *Walden* is clear as to the Hayden principal position in *Walden*. The only distinction between this case and the *Walden* Susan Moore position is that, here, plaintiff had a certificate and Pate didn't, and her grades in school were much better. While the court felt that Pate's relationship with the community was the primary reason for the decision, the jury apparently felt differently. Perhaps they were overly influenced by the lack of female principals and assistant principals even in the absence of "reliable" statistical evidence. Perhaps the jury found plaintiff to be best qualified.

Ultimately, while the court felt strongly in *Walden*, it does not feel so strongly here.[7] One may really never know with any reasonable degree of certainty whether someone has *intentionally* discriminated. Ironically, now that discrimination is supposed to be more "subtle," there are many more such cases filed than when discrimination of types was more flagrant.[8] *Nobody* can really tell when chimera shades into innuendo, or innuendo into colorable, or colorable into subtlety, or subtlety into vapor or aroma, or vapor or aroma

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[7] The court attaches hereto as Exhibit A, a copy of a portion of plaintiff's brief which sets out the basis for a factual issue as to pretext. Similar scenarios can be prepared in just about any case, but perhaps that is the nature of the law in this area. Personnel decisions which at one time were considered unfair are now considered discriminatory. The question is when does *Nix v. WLCY Radio Rahall Communications*, 738 F.2d 1181 (11th Cir. 1984), become applicable.

[8] Recently, my court reporter asked my courtroom deputy (not facetiously), "Do we get *all* of these cases?"

into substance. Ultimately, a trial judge must ask him (her)self two questions. What do I think? What is appellate court likely to think? Here, I have a doubt, but sense that an appellate court, not present at the trial, might conclude that the evidence is sufficient. The court makes great effort to see both sides and is often reminded of the Roman judge who, having seen *both sides* of a disputed question, was immediately attacked and killed by both sides. The court will deny the motion without any great degree of certitude.[9]

This 29 day of September, 1988.

/s/ Robert B. Propst

ROBERT B. PROPST
UNITED STATES DISTRICT JUDGE

Typing of opinion delayed because secretary had surgery.

[9] The very degree of uncertainty in these cases is why this court has been so critical of the loose standards applicable to skyrocketing attorney fee claims and liquidated damage claims in ADEA cases. This court's concern with the high costs of litigation neither begins nor ends with civil rights litigation. It has, in all areas, approached a state of pillage.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

88-7606

D. C. Docket No. 87-1732

MARY E. NICHOLS,

Plaintiff-Appellee,

versus

BLOUNT COUNTY BOARD OF EDUCATION; JOE M. HAZELRIG, individually and as Superintendent of Education; GENE VINSON, individually and as Principal of Locust Fork School,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Alabama

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(June 28, 1989)

Before HILL and COX, Circuit Judges and SNEED*, Senior Circuit Judge.

PER CURIAM:

In the district court, plaintiff/appellee recovered a judgment against the defendants/appellants as to her allegations of discrimination on the basis of sex in the appointment of a male as vice-principal of the Locust Fork School instead of appointing her.

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*Honorable Joseph T. Sneed, Senior U.S. Circuit Judge for the Ninth Circuit, sitting by designation.

Appellants preserved their contention that the evidence failed to support the verdict and that all the evidence demanded a verdict in their favor by moving for a directed verdict at the end of plaintiff's evidence and at the end of all evidence and by moving for judgment notwithstanding the verdict, all of which were denied.

This was a close case, hotly disputed. We have carefully reviewed the record and, concluding that there was sufficient evidence and that the instructions of the court were proper, affirm the judgment from which the appeal was taken.

AFFIRMED.

THE UNITED STATES COURT OF APPEAL
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MARY E. NICHOLS,

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GENE VINSON, individually and as
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Defendants-Appellants.

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING IN BANC
(Opinion June 28, 1989, 11 Cir., 198___, ___ F.2d ___)

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Edward R. Cox

United States Circuit Judge